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MARRIAGE:

BEING A THESIS

FOR

THE DEGREE OF DOCTOR OF LAWS.

BY

WILLIAM JOHNSTON, M.A., LL.B.

Victoria University, Cobourg, Ontario

ATHENS, JULY 28TH, 1891

TORONTO:

WILLIAM BRIGGS,

WESLEY BUILDINGS.

C. W. COATES, Montreal, Que. S. F. HUESTIS, Halifax, N.S.

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MARRIAGE.

CHAPTER I.

ITS MORAL ASPECTS.

THE beautiful and touching Bible narrative of the first marriage will ever cast a romantic halo around the shadowy history of primeval man. The moral teaching of the record it is impossible to misunderstand. This marriage, at least, was made in heaven. God Himself was the Great High Priest who officiated at the ceremony. Angels may have looked down upon the first happy man and wife. The glad earth smiled in youthful beauty upon her lord and master. Homage Adam exacted, and homage he received from the woman God had given him. Protection he guaranteed, and she gave, in return, loyalty to her husband. Common cares and griefs soon knit the hearts of Adam and Eve closer together than ever love could. "I will greatly multiply thy sorrow and conception," was the dread sentence of the Supreme Judge against sinning Eve; and to Adam, "In the sweat of thy face shalt thou eat bread, till thou return unto the ground; for dust thou art, and unto dust shalt thou return." The first family, the first family quarrel, the first reconciliation, the first great joy, the first great grief, follow each other in rapid succession; and the history of the human race repeats, with fearful emphasis, the story recorded in its first chapter.

The end of marriage is the production of offspring. All animals have implanted in them a desire to perpetuate their species; this desire is one of nature's laws, and it is the strongest law in nature, for, without it animal life would soon cease to exist. Man is subject to the same physical laws as animals, and hence the desire in man to beget progeny does not differ in any respect from the animal passion. But the moral faculty of man is not found in any animal, and this power places the human race at an immeasurable distance above the most intelligent animal. Following the instincts of their nature, many animals display a wonderful forethought for the preservation of their young, and the most indefatigable exertion in providing

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for them the means of subsistence while they are in a helpless condition. But as soon as the young are able to provide for themselves the solicitude of the parents ceases. In many cases the male parent contributes in no way towards the support of his offspring. Upon the female parent generally devolves the task of providing sustenance for her offspring until it can provide for itself. In the mammalia this is especially the case. But even here the bond of attachment is broken as soon as dependence ends, and the parent soon ceases to care for the young that no longer needs assistance.

The sentiments of *duty* and *right* have their origin in the *moral* faculty. Hence they are peculiar to man, and it is from them that nearly all that is characteristic of the family, society and the State may be traced. "Am I my brother's keeper?" asked guilty Cain, in the presence of the Righteous Judge, and to that question the family, society and the State has ever given an affirmative answer. The human parent ought to provide for his child, because his moral nature is satisfied by doing so, and dissatisfied if he neglects to do that which his conscience tells him is right. It is right to strike down the man who threatens the life of those I love, because my moral nature impels me to protect them. Why I love them, I do not know, and I do not seek to know. Why my moral nature produces such sentiments I do not know, and I do not wish to know. Why God made man at all I do not know, and I do not desire to know. But I do know that I have thoughts, aspirations, feelings and sentiments which prompt me to do certain acts, the only reason I can give is that it is my duty, or it is right.

Among the most barbarous races of human beings, as well as among the most highly civilized, the family is recognized as the *sine qua non* of society. Many animals "pair" during the time for bringing forth their young, but the association ceases when its immediate object has been accomplished. There is no life-long association among animals, such as is found among men and women. There is no union of souls among animals, for there are no moral souls to unite. Neither is "false heart to false heart joined" among animals, for interest has no place in the action of the brute. The noblest and the basest unions are not found in animal marriages—using the term in its widest meaning—because the sole end of the animal is to obey the law requiring reproduction of the species. Man also obeys this law, but his intellectual part demands many enjoyments which are foreign to the animal nature. The passion of love, peculiar to man, and, perhaps, totally wanting in animals, impels him to seek the life-long

companionship of the object of his adoration. He loves to see his own image and the image of his companion reflected in the countenance of his offspring. He sees himself perpetuated in the children who lean upon him for support, and the comely features of his once youthful wife are reflected in the faces of his sons and daughters. The children who now depend upon him for support and comfort will, in a few years, be the stay of his declining years and the solace of his old age. Such are the thoughts and feelings produced by the moral faculty. All races of men are subject to them, in a greater or lesser degree, and no animal possesses any trace of them. Marriage, undoubtedly, had its origin in such moral sentiments.

Whatever lessens human misery is good. It matters little whether the *summum bonum*—the supreme good—consists in the enjoyment of pleasure and the deprivation of pain ; or in the possession of moral excellence based upon the will to be perfect. In either case the test by which any act is judged is its tendency to increase or decrease human happiness. The act is good if it increases human happiness, and bad if it decreases it. Applying this principle to marriage, several very important moral conclusions are easily deduced.

It has been stated that the end of marriage is the production of offspring. This applies more particularly to man's animal nature. Spiritually considered, marriage has, as an ultimate end, the union of two souls so as to produce a perfect moral being. The *Ego* of the husband unites with the *Ego* of the wife, thus creating an *Ego* containing the spiritual part of each. Some marriages, it is said, are made in heaven; such are the *ideal* marriages. They are happy marriages. But all marriages are not happy ; and it seems to follow as an inevitable conclusion, that the theoretical union of souls by the act of marriage is, to say the least, exceedingly doubtful. It may be argued that if baptism mystically washes away sin, may not the marriage ceremony mystically unite the souls of the contracting parties? The argument is certainly powerful, but it is by no means conclusive. Baptism is clearly based upon the Bible, and it is one of the fundamental rites of all Christian Churches. Marriage has existed among all people, and at all times, so far as history gives us any information. Hence, baptism is exclusively a Christian observance ; whereas, marriage is the universal practice of savage as well as civilized communities. From such considerations it seems that the marriage ceremony is inferior, as a religious rite, to the other fundamental ceremonies of the Christian Church—such as baptism and the holy communion or sacrament of the Lord's Supper.

Morality, in its most comprehensive sense, is obedience to the laws of nature. Hence, marriage, as a moral agent, possesses great power and influence. Marriage is conformity to the laws of nature. The laws of nature never err; for a Being of infinite wisdom has laid down only such laws as are founded on abstract justice. These are the eternal, immutable laws of good and evil, to which the Creator Himself in all His dispensations conforms, and which He has enabled human reason to discover, as far as is necessary for the conduct of human actions. Thus the Institutes of Justinian rest upon three great principles: that we should live honestly, hurt nobody, and render to every man his due. He was a noble Roman in Rome's imperial day, who gave to the world this cup of gladness drawn from the fountain of justice. "Every man must live honestly, he must hurt nobody, and he must render to every man his due," wrote the Roman lawgiver, Tribonian, in the year of Grace 533; and the human race in 1891 are still striving—perhaps in vain—to live honestly, to hurt nobody, and to render to every man his due. Was Shakespeare merely sentimental when he penned the immortal lines, "Who steals my purse steals trash; but he that robs me of my good name filches me of that which doth not him enrich, and makes me poor, indeed?" Was Dugald Stewart right when he wrote the following remarkable words, "The principal part of human happiness consists in a sense of being beloved?" Was Cicero wrong when he said, "It matters little what the public say about me so long as I do what is right?" Is it, indeed, true that a good name is rather to be acquired than great riches? Was it the withdrawal of the love of the Father from His only begotten Son that caused our Saviour to exclaim in agony on the cross, "My God! my God! why hast Thou forsaken Me?" Is a man's consciousness of innocence, honor and rectitude sufficient to protect him from the shafts of envy and malice? Or is it necessary for him to shun the appearance of evil in order to enjoy that peace of mind which alone gives happiness? "All is lost but honor," wrote Francis I., of France, to his mother, after his defeat and capture on the fatal field of Pavia, by the Emperor Charles V. But *honor* was left Francis I., and hence, as soon as his foot again touched the soil of France he felt himself a king. "In honor I have won them, and in honor I shall wear them," replied Lord Nelson, when his staff begged him to remove his medals before beginning the battle of Trafalgar. And thus it ever is; take honor from a man, and you take from him everything. Filch him of his good name, and you make him poor, indeed.

Upon this feeling of honor, or love of respect, rests, to a great extent, the moral value of marriage. The charms of woman are her greatest peril; the passion of man his most deadly foe. The superior strength of man makes woman his easy victim. The credulity and trustfulness of woman are no match for the deceitfulness and selfishness of man. The certainty of punishment, if woman transgresses the moral law, stands out in fearful contrast against the impunity of equally guilty man. The woes of woman plead for mercy at the bar of God, and the Righteous Judge decrees that man shall cherish and protect the woman God has given him. Society demands from man observance of the divine law; and when social law fails to give the required protection, state law comes to the assistance of weak and oppressed woman. To seduce the virtuous, to lay unholy hands upon the sanctity of home, to disrespect woman, have ever been held detestable crimes by the virtuous. Even among uncivilized nations this moral law exercises a most salutary and civilizing influence. As far back as history gives us any information we find traces of it; and it is found with equal strength among the American Indians and the natives of Australia. Woe to the seducer or the adulterer was the safeguard of society in the days of Abraham, of David, and of "false Sextus, who wrought the deed of shame." And woe to the seducer or the adulterer is still the curse which falls upon the ear of him who fails to respect the innocence and virtue of woman. The moral law, relating to the family, is now what it was ages ago. It is based upon the instincts of our nature, and, therefore, it never changes; "For this cause shall a man leave his father and mother and cleave unto his wife, and they twain shall be one flesh." The moral nature is satisfied only when "they twain are one flesh." A mysterious union of souls it may be; but it also is the greatest of all moral agents, and the principal factor in the development of the mental and physical powers of man. It is sad to think that marriage is necessary as a means of compelling the male parent to provide sustenance for his offspring. The cares and responsibilities of the father are so burdensome that, in many cases, he would desert his child if the law did not compel him to provide for its support. Thus the animal nature of man may prevail over the spiritual. But by marriage the child is brought in contact with both parents from its birth, and soon the natural affection which exists between parent and child binds the father to the child with cords which are light as air, but strong as iron. And this is the moral value of marriage.

CHAPTER II.

HISTORICALLY CONSIDERED.

THERE can be no doubt that polygamy was universal in the first stages of man's advancement from barbarism to civilization. And it is also certain that polygamy was practised to a much greater extent in the eastern than in the western hemisphere. As far as the Bible gives us any information regarding the early history of man, plurality of wives is stamped upon it, as a characteristic of the people whose acts are recorded on the sacred page. And, not only is this true of the nations of Western Asia, for the Hindoos and other nations of the south and east of Asia are still notorious polygamists. In Europe, with the single exception of Turkey, polygamy is now unlawful. The Germanic and Sarmatian races were in the earliest times notorious for their chivalrous nature, their love of freedom, their devotion to woman, their hatred of wrong and their sympathy for the weak and defenceless. This magnanimous nature developed into the knight and the cavalier, whose mission was to protect woman, respect home and foster literature The Germania of Tacitus was occupied by tribes who were so virtuous in their marital relations that they excited the admiration of the Roman historian. Monogamy was a distinctive characteristic of the wild men of the German forests who cut to pieces the legions of Varus. And it should ever be remembered that the English people are the lineal descendants of the early German monogamists. But monogamy was not confined to Germany among the ancients, for it was the practice in Egypt, long before history takes any notice of it on the banks of the Rhine. However, the Egyptian marriage law placed the wife on probation for one year, at the end of which time the husband possessed the right to ratify or repudiate the marriage contract. This Egyptian marriage law is another illustration of the degradation of woman, peculiar to all eastern countries. It is worthy of notice that polygamy has always been confined, to a great extent, within the tropical and torrid regions. This fact is suggestive; for it proves how difficult it is to elevate man morally, when the laws of nature tend to degrade him. If monogamy were the law of marriage in tropical countries, would the population rapidly decrease, and the race in a few generations become extinct? Woman, in a torrid climate, ceases to

bear children at a very early age, and her family is never so numerous as are the families in the temperate regions. This is a natural cause of a social system that can never cease to be degrading. Another cause of polygamy is the increase of man's sensual passion as his manual labor decreases. In the tropical and torrid regions, nature provides sustenance for man unsolicited and in abundance. A hot climate, also, adds fuel to man's lustful passion, which plunges him into excess, when not controlled by that enlightened reason which guides man only when he becomes acquainted with the true principles of his physical and spiritual nature. But, man can never ascend, intellectually or spiritually, while he is a polygamist. The noblest thoughts and feelings of the human heart can have no place in the breast of him who is the husband of more than one wife.

Monogamy has ever characterized the higher races of the human family. Polygamy has ever marked the laggards in the race of progress. The monogamists of Europe have given the world all that is great, good and noble. The polygamists of Asia stand now where they stood when King Solomon sauntered listlessly among his seven hundred wives and three hundred concubines. All the literature, science and art which has given joy and gladness to this sin-cursed world, has been produced by the man who is the husband of one wife. The noblest conceptions of mother, home and heaven are found in the hearts of the people who abhor polygamy. The basest conception of heaven—a seraglio stretching out to infinity—rests in the breast of the Mohammedan. As a man's life is, so will his thoughts be. Sensuality always degrades. The contemplation of the pure and the good always elevates. Hence, whatever may be the *physical* arguments in favor of polygamy, no other conclusion can be arrived at than that it is one of the greatest obstacles in the way of civilization and intellectual advancement.

The form of the marriage ceremony has varied with advancing civilization and moral development. Among barbarous races it consisted merely in the forcible capture of the woman by the man. Possession of the woman by the man gave him a legal right to enjoy the woman, just as in the law of real property, peaceable enjoyment for a certain time gives the possessor an indefeasible right to the property. In the second stage of the marriage ceremony, the capture of the woman was the symbolical marriage following the sale or gift of the woman to the man by her parents or relatives. This form of marriage marks the semi-civilized period of the world's history, and it has always been characteristic of the nomadic tribes who have

roamed for ages over the upland plains of Asia. The sale of the daughter by her father to the lover, recalls the story of Jacob, Leah and Rachel, which still casts its seductive influence around the primitive history of God's chosen people. But strip the narrative of its deceitful lustre, and view it in the light of Christian intelligence, and the banefulness of the system is at once apparent. Woman is a chattel. She is sold like the ox or the ass. Her freedom of will is but a mockery. She becomes, in truth, a beast of burden, and her husband is her lord and master. And, how fearfully has nature punished those who have thus violated her laws! The European is now master of the Asiatic.

The third stage in the development of the marriage ceremony marks the state of complete civilization. Woman's individuality and freewill are here fully recognized. Mutual conveyance or dedication of the one to the other is now the marriage contract. This mutual conveyance is very generally associated with religious ceremony, and in modern times is, as a rule, valid only when performed in a manner prescribed by, and in the presence of, officials recognized by the State. The consent of parents or guardians is often also necessary. Marriage then becomes a civil contract, but it is a contract *sui generis*, for it is not revocable at the will of the contracting parties, which is, with few exceptions, the case in all other contracts. The religious part of the ceremony is merely added to give additional solemnity.

But, far beneath polygamy, there existed, among many barbarous tribes, a marriage system so utterly degrading that it can never be contemplated without aversion and disgust. This repulsive social system consisted in a community of wives; that is to say, a household consisted of twelve or more men and as many women, who were the common wives of all the men. Surely this social condition of man marks the lowest depth of degradation to which he can sink! If the "missing link" ever had anything but a theoretical existence, it might be found among those primitive communists. Among the tribes who, at one time, consorted in this promiscuous manner must be classed the ancient Britons. But the practice does not seem to have been confined to the west of Europe, for more than three hundred years before the birth of Christ, Plato, in his "Republic," seriously advocated such a political system, as the basis of a government, that would be most conducive to the welfare of the State. The cultured Grecian never knew that "the principal part of human happiness consists in a sense of being beloved." If he had known that

great ethical truth, he would not have advocated a civil polity that would banish the Home and the Family from this earth, and sink man to the level of the brute. How love and hatred, beauty and deformity, humanity and cruelty are mixed by this best of all heathen philosophers! "Love your friends and hate your enemies," wrote Plato, in the noblest age of Grecian civilization. And, long years afterwards, our Saviour contradicted that statement, when He said: "*Love your enemies*, do good to them that hate you, and pray for them that despitefully use you and persecute you." This is a nobler morality than Plato ever knew; and that exalted love of humanity bore fruit in the purification of society, by eliminating from it all that was gross and sensual in marital relations. Christianity has ever been the champion of monogamous marriages. The apostles were commanded to be husbands of one wife; and this command soon became the law of the Church of Christ. The God-Man who wept at the grave of Lazarus, and said to the woman taken in adultery, "Go in peace, and sin no more," raised Woman from social degradation to an honored position as the companion of man.

Society in our time consists of an aggregate of individuals; in ancient times it was made up of a number of *families*. That is, the unit of the ancient state was a *family;* the unit of the modern is an individual. Taking the Bible narrative as our guide, we may conclude that a community began to exist wherever a family remained together instead of separating at the death of the patriarchal chieftain. In many of the Greek states, and also among the Romans, there long remained the vestiges of an ascending series of groups, out of which the State was subsequently constituted. Those groups were known among the Romans as the Family, the Gens, or House, and the Tribe. The elementary group was the Family; an aggregate of families made the Gens; and a group of Gens constituted the Tribe; while the aggregation of Tribes gave birth to a Commonwealth. The ancient constitution of the State has an important bearing upon the history of marriage. This is particularly the case with respect to the constitution of Rome, because the greater part of the marriage laws of Europe and America is based upon the civil law, that is the Roman law. Thus the patriarchal power of the father of the family, which was a characteristic of the Asiatics, and also existed in the rude jurisprudence of the tribes on the banks of the Danube and the Rhine, developed into the Roman Patria Potestas, or Power of the Father. This *family rule* gave the father the absolute control (in civil matters) of all his lineal descendants, and also of those who

married into the family or were admitted by agnation, that is, adoption. We can scarcely conceive that this extraordinary and inordinate power of the father could exist for any great length of time in a civilized community. Its tyranny over the person and property was such that the State must early have revolted against it. When history first gives us any information regarding the "power of the father," "the parent has over his children the power of life and death, of uncontrolled corporal chastisement; he can modify the personal condition at pleasure; he can give a wife to his son; he can give his daughter in marriage; he can divorce his children of either sex; he can transfer them to another family by adoption; and he can sell them." This rule evidently belongs to the time of patriarchal government. It is not definitely known at what time the power of the father began to decline; nor has the history of that decline ever been fully traced. But it is certain that about the beginning of the Christian era the Patria Potestas was becoming exceedingly unpopular, and the establishment of the Empire completed its destruction.

It is worthy of notice that, while ancient law made woman subordinate to her blood relations, modern jurisprudence has subordinated her to her husband. The history of the change begins far back in the annals of Rome. The ancient law of Rome recognized three distinctive modes of contracting marriage. The first was a religious marriage, known as *Confarreation;* the second and third modes were both *civil* marriages; but one styled Coemption was considered of higher rank than the other, which was denominated *Usus.* By each of those marriages the husband acquired a number of rights over the property and person of his wife, which, on the whole, exceed the privileges conferred by any modern system of jurisprudence upon the husband, as against his wife. But the husband acquired those rights, not in virtue of his capacity as a *husband,* but as the *father* of his *wife.* Thus were there fictions in Roman law long before they had an existence in the laws of England. By the Confarreation, Coemption and Usus the woman became, *in law,* the *daughter* of her husband. The wife became part of the Patria Potestas of her husband, the husband became the absolute owner of his wife's property. All the liabilities springing out of the Patria Potestas were incurred by the wife, not only during the life of her husband, but even after his death, should she survive him. There was also a fourth form of marriage, which may be described as a modification of the *Usus* marriage. This marriage amounted, *in law,* to little more than a temporary deposit of the woman by her

family. Hence, it was long considered disreputable; but about the time that Eastern luxury began to sap the moral strength of Rome, this loose form of marriage succeeded in supplanting the ancient and nobler marriage ceremonies. Thus, again, national greatness produced moral weakness. It had sunk Babylonia, Persia and Greece in hopeless ruin, and now it was sowing the seed of destruction among the people of Rome. Under this new marriage law "the rights of the wife's family remained unimpaired, and the lady continued in the tutelage of guardians whom her parents had appointed and whose control overrode, in many material respects, the inferior authority of her husband." The evil effects of such a marriage relation requires no explanation; and the result was that in a few generations the marital relation, at Rome, was the loosest the Western World has seen. In this deplorable condition was marriage at the time Christianity became the *State* religion of the Roman Empire, and hence the asceticism of the Fathers of the Church, which finally gave birth to the *monk* and the *nun*.

And here, also, it may be noticed that the matrimonial law which, until very lately, bore so heavily upon the freedom of woman is threefold in its origin, consisting of three strata placed upon each other in chronological order. The lowest is the patriarchal law, which was, as we have seen, especially degrading to woman. The second stratum is the civil law; and, resting upon it, is the barbarian code of the conquerors of Rome. During the period of unification of the Roman and barbarian peoples, the dominant races are seen everywhere under various form of guardianship, and the husband who takes a wife from any family, except his own, pays a certain sum to her relations, in consideration of a waiver of the right of tutelage which still rested in the wife's family. Finally, when the amalgamation of the two contending races became complete, it is found that unmarried females are relieved from the bondage of the tutor or guardian; but the wife is subordinated to her husband. The husband, in his marital character has transferred to him the rights which formerly resided in his wife's guardian. The wife is still in subordination, but her master is now her natural protector. Hence the comparative freedom allowed to unmarried women and widows, which is a characteristic of the marriage law of the south and west of Europe, and of the heavy disabilities imposed upon wives. It is also worthy of notice that the law relating to unmarried women and widows is Roman in its origin, while the law fixing the status of the wife is barbarian as to its source, as well as its principle. It was long before the subordination,

entailed upon the female sex by marriage was sensibly diminished. The "Institutes of Justinian" did much to relieve the wife from the marital disabilities under which she had so long labored. But the marriage law still continued to be read in the light of canon law, *i.e.*, the law of the Church, rather than in that of Rome, which was the secular law of the Empire. And this continued subordination is mainly to be attributed to the influence of the Christian Church, which, by a strict adherence to the Hebrew marriage law as found in the Old Testament, diverged widely from the spirit of the more magnanimous law of Rome. Indeed, there are still many vestiges of the struggle between the secular and ecclesiastical principles, but the canon law nearly everywhere prevailed. In some of the French provinces the *local law* is, to a great extent, Roman; while in Denmark and Sweden, the marriage law is, almost exclusively, the canon law. And yet more stringent in the proprietary incapacity it imposes is the common law of England, except in so far as it has been ameliorated by the equity courts and statute law. (Based upon "Maine" and "The Institutes.")

CHAPTER III.

THE LEGAL ASPECTS OF MARRIAGE.

I SHALL now proceed to consider the legal rights and responsibilities of the parties effected by marriage, in the examination of which I shall first inquire how marriages may be contracted; in the second place, I shall point out how they may be dissolved; and, lastly, I shall present the legal effects and consequences of marriage, and of its dissolution. And, here, it should be observed that, until quite lately, only the ecclesiastical courts had jurisdiction in matrimonial causes, and possessed the power of annulling incestuous and other unscriptural marriages; but as such courts only acted for the *spiritual good* of the accused, their power ceased at the death of the parties implicated. This authority exercised by the clergy while Roman Catholicism was the State religion, remained in the spiritual courts till A.D. 1857, when it was taken from them by the Statute 20 and 21 Victoria, c. 85, which established the "Court for Divorce and Matrimonial Causes."

Even before the dissolution of the spiritual courts, the law of England regarded marriage simply as a contract, and took no notice of its religious accessories. Hence, the law allowed marriage to be good and valid in all cases, if the parties to the contract were (1) willing to contract, (2) able to contract, and (3) did contract; thus applying to the marriage contract the rules which govern the validity of any other contract. First, the parties must be willing to contract, for, "*Consensus non concubitus, facit nuptias*" is the maxim of the Roman law. *Oneness* of *mind*, not *sexual intercourse*, *constitutes marriage*, is the English legal maxim borrowed from the Roman jurisprudence. Indeed, almost all our notions of the legitimacy of marriage are derived from the *canon* and *civil* laws. Secondly, the parties must be able to contract. In general all persons possess legal capacity to contract themselves in marriage, unless they labor under some particular disabilities or incapacities, the nature of which will now be considered.

Contractual disabilities were of two kinds; first, canonical, and secondly, civil. The canonical disabilities were sufficient to avoid the marriage in a spiritual court; but they only made the marriage *voidable*, and not *void ab initio*. Hence, the marriage was valid until the decree of nullity was pronounced by the spiritual court; and if a sentence of separation was not obtained, during the lifetime of the parties to the contract, it could not be rendered after their decease; for, after the death of either of them, the courts of common law would not suffer the spiritual courts to declare such marriages to have been void, because such declaration could not tend to the reformation of the parties. These canonical disabilities were, (1) pre-contract, (2) consanguinity, or relation by blood, and (3) affinity, or relation by marriage; to which may be added some particular corporeal infirmities which render sexual intercourse impossible. The disability of pre-contract is now abolished, and the others are cognizable in the temporal courts, and generally make the marriage in itself utterly void.

Pre-contract constituted a disability until, by Statute 32 Henry VIII., c. 38, it was abolished, except the marriage had been consummated by bodily knowledge; in which case the contract was held to constitute a marriage *de facto*. By the 13th section of 26 George II., c. 23, the disability of pre-contract is abolished, whether there has been consummation or not.

The existing disabilities to marriage owe their force to municipal law; and, except in case of nonage or physical infirmities, they render the contract void *ab initio;* that is, they

do not dissolve the contract, but they prevent the formation of any legal contract. They do not *separate*, but they prevent *legal union*. Hence, if any persons laboring under these legal incapacities come together, it is not a matrimonial union, in the legal sense of the term, but merely unlawful cohabitation. The first legal disability is a prior marriage; that is, having another husband or wife. This is not only a *sin*, but also a *crime*. It is punished as a felony, and the second marriage is, to all intents and purposes, void. I have previously shown, from a moral standpoint, that polygamy is contrary to natural law, and also, that it is at variance with the spirit of the New Testament; and, therefore, it is only necessary to add, in this connection, the dictum of Justinian that, "*Duas uxores eodem tempore habere non licet*," it is not lawful to have two wives at one time. All honor to the noble Rome who gave to the world this key-stone of Christian morality and political stability! The second legal disability is, want of age. Since that is sufficient to render voidable other contracts, on the ground of immaturity of judgment in the infant who contracts; *a fortiori*, it ought to avoid the marriage contract, which is the most important of all contracts. Therefore, if a boy under fourteen, or a girl under twelve years of age, marries, this marriage is not binding, and either party may, on arriving at the age of maturity—fourteen and twelve years in English law—avoid the marriage without a divorce or sentence of a court. But, if at the age of consent the contracting parties agree to continue together, it is not necessary for them to be married again. If the husband be of contractual capacity, fourteen years, but his wife under twelve years, when the marriage was celebrated, the husband may repudiate the marriage when his wife arrives at the age of discretion, as well as the wife; for, in the marriage contract, as in others, the obligation must be mutual; and so it is, *vice versa*, when the wife is of years of discretion but the husband is not. This rule, however, does not extend to marriages in which the husband is fourteen and the wife twelve years of age.

The third incapicity is want of reason, without which neither can the marriage nor any other contract be valid. Formerly, it was held that the issue of an idiot was legitimate, and consequently that the marriage was valid. But this view was antagonistic to the principle that there can be no legal contract without mutual consent. Hence, the civil law held, more sensibly, that deprivation of reason made a legal marriage impossible. And modern law has followed the determination of the civil law, in making it an inflexible rule that the

marriage of a lunatic—unless celebrated during a *lucid* interval —is absolutely void. But, as it would be difficult to prove the lunatic of *sound mind* at the time of the celebration of the nuptials, the Statute 15 George II., c. 30, provided that the marriage of a lunatic (found such by legal process), before he or she is declared of sound mind (as provided by law), shall be void.

The fourth disability is relationship by consanguinity or affinity. By Statute 32 Henry VIII., c. 38, it is declared that all persons may lawfully marry, except such as are prohibited by God's law. Therefore, the marriages unlawful (by English law) are those between parties related by consanguinity or affinity of the first, second or third degree, according to the Levitical law. Marriages between parties who are of the fourth or any higher degree are, therefore, lawful. Thus a father cannot marry his daughter, because the relationship is of the first degree; a brother cannot marry his sister, for they are related in the second degree; nor can a man marry his niece, because they are related in the third degree. But first cousins or a nephew and a great-aunt may marry, for the relationship is of the fourth degree. Relationship by affinity always arises by marriage, but it extends only to the *blood relations* of each party united by wedlock. Thus a husband is related by affinity to all the *blood relations* of his wife, and *vice versa*, a wife to all the *blood relations* of her husband. And the degrees governing relationship by affinity are the same as those relating to consanguinity, so that a man cannot marry the sister of his deceased wife, for she, being his *sister* (from a legal standpoint), is related to him in the second degree. Nor can a man marry the aunt or niece of his deceased wife, or her daughter by a former marriage, because the relationship, in each case, is of the third degree.

In support of the prohibition of marriage between parties related by consanguinity or affinity, I shall give the following *moral* reasons: If there were not an insurmountable barrier between near relatives called to live together in the greatest intimacy, this contact, continual opportunities, friendship itself and its innocent caresses, might kindle fatal passions. The family—that retreat where repose ought to be found in the bosom of order, and where the movements of the soul, agitated by the scenes of the world, ought to grow calm—would itself become a prey to all the inquietudes of rivalry and to all the fury of passion. Suspicions would banish confidence—the tenderest sentiments of the heart would be quenched—eternal enmities or vengeance, of which the bare idea is fearful, would take their

place. The belief in the chastity of young girls, that powerful attraction to marriage, would have no foundation to rest upon; and the most dangerous snares would be spread for youth in every asylum where it could least escape them. Did not the law prevent such marriages, there would be rivalry between a married person and certain relatives; marriageable women would be deprived of marriage on account of want of confidence in those who might desire to marry them; the authority of the parent would be weakened if he could *hope* to have his daughter to wife; and physical strength would degenerate, as a natural result of premature sensual indulgences. Who can doubt the wisdom of the law forbidding *relatives* to marry? But as every *rule* has its exception, it may safely be said that no valid reason can be given for the prohibition which makes it unlawful for a man to marry his deceased wife's sister. The argument in favor of the prohibition is that it prevents rivalry between sisters; the argument against the prohibition is that the *aunt* is the *natural* protector of her sister's children, and, therefore, that her protection will not cease when she becomes their stepmother. It seems that the good to the children outweighs the evil inflicted upon the jealous sisters; and, if this is the case, it should be lawful to marry a deceased wife's sister.

But the parties must not only be *able* and *willing* to contract, they must contract themselves in legal form to make a good civil marriage. Before the Statute 26, George II., c. 33, any contract made in the presence of, and with the assistance of a priest in holy orders, was a valid marriage at common law; but from the passing of that statute till A.D. 1822, it was held that no marriage was valid unless it was celebrated in some parish church or public chapel; and from that time the rigor of the marriage rules was much relaxed by the passing of Acts which gave power to all Nonconformists to perform the ceremony in accordance with statutes enacted for that purpose.

The marriage law of Ontario is based upon that of England, and its provisions are as follows:

"The ministers and clergymen of every church and religious denomination, duly ordained or appointed according to the rites and ceremonies of the churches or denominations to which they respectively belong, and resident in Ontario, may, by virtue of such ordination or appointment, and according to the rites and usages of such churches or denominations respectively, solemnize the ceremony of marriage between any persons not under a legal disqualification to contract such marriage. But no minister or clergyman shall solemnize the marriage ceremony unless authorized to do so by license, or certificate, or the publi-

cation of banns. Before any license or certificate is granted, one of the parties to the intended marriage shall personally make an affidavit, which shall state, (*a*) the place at which the marriage is to be solemnized ; (*b*) that he or she believes that that there is no affinity, consanguinity, precontract, or other lawful cause or legal impediment to bar or hinder the solemnization of the marriage ; and (*c*) that one of the parties has, for the preceding fifteen days, lived in the jurisdiction of the issuer of the license, or, if such is not the case, he or she must show that the license is not obtained in such place to evade due publicity or for any other improper purpose.

"In case either of the parties, not being a widower or widow, is under the age of twenty-one years, the affidavit shall further state that the consent of the person whose consent to the marriage is required by law has been obtained thereto ; but if there is no person having authority to give such consent, then upon oath having been made to that effect, it shall be lawful to grant the license notwithstanding the want of such consent. The time or place of the celebration of marriage is immaterial. Every clergyman shall, immediately after he has solemnized the marriage, enter in a book, to be kept by him for that purpose, a true record of the marriage ; and he is required to give a certificate of the marriage, under his hand, if requested to do so by either of the parties thereto. No clergyman who performs a marriage ceremony, after banns published, or after a license or a certificate duly issued, shall be subject to any action or liability for damages, or otherwise, by reason of there having been any legal impediment to the marriage, unless at the time when he performed the ceremony he was aware of the impediment."

And the Canadian Act respecting offences relating to the law of marriage provides: "That every one who, without lawful authority, the proof of which shall lie on him, solemnizes, or pretends to solemnize, any marriage, or procures any person to solemnize any marriage, knowing that such person is not lawfully authorized to solemnize such marriage, or knowingly aids or abets such person in procuring such ceremony, is guilty of a misdemeanor, and liable to a fine, or to two years' imprisonment, or to both. Every one who procures a feigned or pretended marriage between himself and any woman, and every one who knowingly aids and assists in procuring such feigned or pretended marriage, is guilty of a misdemeanor, and liable to two years' imprisonment. But no person shall be convicted of any such offence upon the evidence of one witness, unless such witness is corroborated in some material particular by evidence implicating the accused ; and, in every case, the defendant shall

be a competent witness, in his own behalf, upon any charge or complaint against him; but no prosecution shall be begun after the expiration of one year from the time when the offence was committed. Every one who, being lawfully authorized, knowingly and willfully solemnizes any marriage in violation of the laws of the Province in which the marriage is solemnized, is guilty of a misdemeanor, and liable to a fine or to one year's imprisonment; but no prosecution for such offence shall be commenced, except within two years after the offence is committed. Every one who, being married, marries any other person during the life of the former husband or wife, whether the second marriage takes place in Canada or elsewhere, is guilty of felony, and liable to seven years' imprisonment. But this punishment of bigamy shall not extend to (*a*) any second marriage contracted elsewhere than in Canada by any other than a subject of Her Majesty, resident in Canada, and leaving with intent to commit the offence; (*b*) any person marrying a second time whose husband or wife has been continually absent from such person for the space of seven years then past, and who was not known by such person to be living within that time; (*c*) any person who, at the time of such second marriage, was divorced from the bond of the first marriage; or (*d*) any person whose marriage has been declared void by the sentence of any court of competent jurisdiction.

The legal effects of marriage, and also of its dissolution, will now be considered. And first, as to the consequences of marriage; by the *fact*, the husband and wife become one person *in law;* the legal existence of the wife is incorporated in that of her husband; and this disability of the wife continues while she remains in coverture, but ceases on the death of her husband, or on her legal separation from him. Upon this principle of *merger* exists all the legal rights, disabilities and duties of both husband and wife. Hence, under the common law of England a man cannot grant anything to his wife or enter into any covenant with her, for the grant would assume her separate existence, and to covenant with her would be to covenant with himself; and, therefore, it is generally true that contracts made between husband and wife before marriage are rendered void by their subsequent intermarriage. But a husband may covenant with others as trustees for his wife, or he may convey to trustees for the benefit of his wife, or bequeath anything to his wife by will, for that cannot take effect until after the death of the husband. So the wife may act as agent for her husband, for in doing so she merely represents her lord.

Generally, the husband is bound by the contracts of his wife,

his assent being assumed, if there is presumptive evidence of cohabitation, but this assumption is subject to rebuttal. As it is the duty of the husband to provide his wife with necessaries, he is generally liable upon debts contracted by his wife for that purpose. This rule, however, does not apply to things which are not necessary; but it should be observed that "necessaries" include all articles befitting the rank and station of the wife, and not merely such as are necessary articles of food and clothing. If the husband and wife are living apart, the husband is liable upon the contracts of his wife *for necessaries*, unless he provides a sufficient allowance for the separate maintenance of his wife, and sees that it is paid. In every case the husband is not liable for the payment of things which are not necessaries, except they have been supplied by his authority. In no case is the husband liable upon the debts of his wife if she has eloped and is living with another man. However immoral the husband may be, the wife cannot compel him to provide separate maintenance for her if her own life is not pure. "He that comes into a court of equity must come with clean hands."

Under the Married Women's Property Act, 1882, "All property, real or personal, possessed by a woman before, or acquired after, marriage is her separate property. She can acquire, hold and dispose of it by will or otherwise, in the same manner as if she were a *feme sole*, without the intervention of a trustee. But property may still be settled upon her in trust, and she may be restrained from anticipating property so settled. In respect of and to the extent of her separate property, a married woman may enter into contracts as though she were a *feme sole*. Every contract entered into by her is to be deemed to be entered into in respect of her separate property, to bind it, unless the contrary is shown, and not only the property she is possessed of or entitled to at the date of the contract, but all that she may subsequently acquire. And on such contracts she may sue and be sued, without joining her husband as a party to the suit. The liability upon the contracts does not appear to be personal, but to rest upon the separate estate, and to be limited by the extent of such estate. Where a joint judgment is given against husband and wife, it is to be given against the husband personally, and against the wife as to her separate property; and it is only in the case of a wife trading apart from her husband that she is made subject to the bankruptcy, in the same way as if she were a *feme sole*."

The husband is bound to pay the debts of his wife contracted before marriage; but in respect of such indebtedness he must be sued jointly with her; and if she die before payment, the

husband is no longer liable, unless she has separate property to which he administers. In case the legal existence of the husband is suspended or extinguished (as in felony), the wife may then sue or be sued as a *feme sole*, for it would be unreasonable if no remedy were provided.

The husband, by the old law, might give his wife moderate correction; the reason assigned being that as he was to answer for her misbehaviour, it was but right that the law should give him power to restrain her by such domestic correction as is exercised by a father over his children, or a master over his apprentices. But as social refinements increased, this power of the husband over his wife became necessarily more and more unpopular, until finally, as far back as in the reign of Charles II., it began to be doubted whether the husband had ever legal power to chastise his wife. And now a wife may have security of the peace against her husband, and so may the husband against his wife.

The dissolution of marriage can only take place in two ways: (1) by the death of husband or wife, and (2) by their divorce. On the death of the wife, the husband becomes entitled to a life-interest in all lands and tenements of which the wife at any time during the coverture was solely seized in possession of an estate of inheritace, in fee-simple or fee-tail, provided the husband has by her issue born alive which was capable of inheriting the estate, the husband is then said to be tenant by the courtesy of England. On the death of the husband, the wife becomes entitled to a *life interest* in one-third of the real property of her husband, and one-third of his personal property absolutely. This is the wife's dower. But the husband may defeat the wife's right of dower by disposing of his property during his lifetime, or by will. Moreover, all partial dispositions, such as mortgages or contracts, made by the husband, and even his debts, shall be good against her dower. Her dower may also be barred by any declaration, by deed or will, made by the husband, that his wife shall not be entitled to dower out of certain lands. Also a devise in lieu of dower may be made which will effectually bar her right to dower in all the lands of her husband. Thus it appears that the wife's title to dower is put absolutely within the control of her husband, and now she can only be endowed out of lands of which he dies *intestate*, and concerning which he has made no declaration against her dower.

In the last place, I shall consider the effect of a divorce, and also of a judicial separation, upon the parties affected by it. The separation produced by a divorce is so complete that if the

divorced parties again cohabit they commit adultery, and the children born of such cohabitation are bastards. There is nothing, however, to prevent divorced persons from marrying again. If the marriage be pronounced void on the ground of consanguinity, or otherwise, the effect is the same as if it had never taken place. If the marriage is dissolved on the ground of misconduct of either party, the court, in its discretion, may allow alimony. A judicial separation is merely a legal severance of the parties from bed and board (*a mensa et thoro*). It does not dissolve the marriage, and hence the separated parties may again assume marital relations when they mutually agree to do so. After judicial separation the wife has the status of a *feme sole*. (Based upon "Blackstone.")

CHAPTER IV.

THE MARRIAGE LAW OF NATIONS.

HAVING presented the moral, historical and legal aspects of marriage in the preceding chapters, I shall in this chapter treat of those principles relating to marriage which are common to all civilized nations, and, therefore, form part of the legal substructure of the law of nations. Marriage has ever been treated by civilized nations as a peculiar and favored contract. Throughout Christendom, marriage means the voluntary union for life of one man and one woman. The term is, therefore, not applicable to the union of a man and a woman as practised among the Mormons, by whose faith polygamy is lawful. It is the parent, and not the child, of society. In civil society it becomes a civil contract regulated and prescribed by law, and endowed with civil consequences. In many countries the civil ceremony is connected with religious observance; but this is for the purpose of adding force to the ceremony; the legal part is the *civil*, the religious addition having no binding legal efficacy. By the common law of England (and the law exists in America), marriage is purely a civil contract; in the Catholic countries, and in some of the Protestant countries of Europe, it is treated as a sacrament.

It is a general principle that between persons *sui juris*, marriage is to be decided by the laws of the place where it is celebrated. If valid there, it is valid everywhere. It has a legal ubiquity of obligation. If invalid there, it is equally invalid everywhere. The most prominent exceptions to this rule are those marriages involving polygamy and incest, and those positively prohibited by the public law of a country from motives of policy, and those celebrated in foreign countries by subjects entitling themselves, under special circumstances, to the benefit of the laws of their own country. But in conformity with the general principle, a marriage celebrated in a foreign state, to evade the law of the place of domicil, is held valid; and if a person divorced from his first wife is rendered, by the law of the place of divorce, incapable of contracting a second marriage, still, if he contracts marriage in another state where the same disability does not exist, the marriage will be held valid. That is, the *lex loci contractus* governs in relation to to the *validity* of contracts, and the *marriage* contract is made to conform to the general rule. Hence the status of the offspring ought to depend upon the same law.

"A question has been much discussed, how far a marriage, regularly celebrated in a foreign country between persons belonging to another country who have gone thither from their own country for that purpose, is to be deemed valid, if it is not celebrated according to the law of their own country." In France such marriages are held void, on the ground of fraud committed by the contracting parties in evading the law of their domicil. But in England and America it has been settled, after a long struggle, that such marriages are good; this conclusion is a violation of the principle that evidence of fraud avoids a contract; but it is based upon the broader principle that the *public good* should be the constant aim of the legislator. The tenderness of the law for the offspring of such marriages has resulted in making the nuptial relations of the contracting parties legal and binding upon them.

Having considered how far the validity of marriages is to be decided by the law of the place where they are celebrated, I shall next present the operation of foreign law upon the incidents of marriage which respect the personal and proprietary rights of each, viewed in their relation toward each other as husband and wife.

It must, however, be stated that "the jurisprudence of different nations contains almost infinitely diversified regulations upon the subject of the mutual obligations of husband and wife; their personal capacities and powers, and their mutual

rights and interests in the property belonging to or acquired during the existence of the marriage." Indeed, it is hardly possible to enumerate the different rules adopted in the customary law or in the positive law of different provinces of the same empire in some of the countries of Europe. "In some places the laws which place the wife under the authority of her husband, extend to all her acts—as well to acts *inter vivos* as to acts testamentary—in others, the former only are prohibited. In some places the consent of the husband is necessary to give effect to the contracts of the wife; in others the contract is valid, but is suspended in its execution during the life of the husband. In some places the wife has no power over the administration of her own property; in others the prohibition is confined to property merely *dotal*, and she has the free disposal of her own property." Such are the difficulties which beset the investigator of this branch of international law!

In order to present clearly the variety of questions which may arise to embarrass the administration of justice in different countries, I shall place in contrast the marriage jurisprudence of England and France, which are two of the most polished and commercial states of the world. The present code of France does not attempt the distribution of property between husband and wife, except in the absence of contract between the parties which they have a right to make within certain limitations. When such special stipulations are not entered into, the case is governed by the *rule* of *community*, which may be best described as a *nuptial partnership*. This *rule* "extends to all movable property of the husband and wife, and to the fruits, revenues and incomes thereof, whether it is in possession or in action at the time of the marriage, or is subsequently acquired. It extends also to all immovable property of the husband and wife acquired during the marriage, but not to such as was possessed by either at the time of the marriage, or came to them afterwards by title of succession or by gift. The property thus acquired by this nuptial partnership is liable to the debts of the parties existing at the time of the marriage; to the debts contracted by the husband during the community, or by the wife during the community—with the consent of the husband; and to debts contracted for the maintenance of the family and other charges of the marriage. As in common cases of partnership, recompense may be claimed and had for any charges which ought to be borne exclusively by either party. The husband alone is entitled to administer the property of the community, and he may alien, sell and mortgage it without the concurrence of his wife. He cannot, however,

dispose *inter vivos* by gratuitous title, of the immovables of the community, or of the movables, except under particular circumstances; and testamentary dispositions made by him cannot exceed his share in the community. The community is dissolved by natural death, by civil death, by divorce, by separation of body, and by separation of property. Upon separation of body or of property, the wife resumes the free administration of her movable property, and may alien it. But she cannot alien her immovable property without the consent of her husband, or without being authorized by law upon his refusal. Dissolution of the marriage by divorce gives no right of survivorship to the wife, but that right may occur on the civil death or the natural death of the husband. Upon the death of either party, the community being dissolved, the property belongs equally to the surviving party, and the heirs of the deceased, in equal moieties, after the due adjustment of all debts, and the payment of all charges and claims on the fund."

"Such is a brief outline of some of the more important particulars of the French code, in regard to the property of married persons in cases of community. The parties may vary these rights by special contract, or they may marry under what is called the *dotal* rule."

"In regard to the personal rights, capacities and disabilities of the parties, it may be stated that, independently of the ordinary rights and duties of conjugal fidelity, succor and assistance, the husband becomes the head of the family, and the wife can do no act in law without the authority of her husband. She cannot, therefore, without his consent, give, alien, sell, mortgage or acquire property. No general authority even though stipulated by marriage contract, is valid, except as to the administration of the property of the wife. But the wife may make a will without the authority of her husband. If the wife is a public trader, she may, without the authority of her husband, bind herself in whatever concerns her business, and in such cases she also binds her husband, if there is a community between them."

If we compare this nuptial jurisprudence of France with that of England, many striking differences present themselves. It has already been shown that the law of England places the wife completely under the guardianship and coverture of the husband, and that the husband and wife are, in contemplation of law, one person. He possesses the sole power and authority over the person and acts of the wife; so that her legal existence is said to be suspended during the marriage. The husband cannot grant anything to his wife, or enter into a covenant

with her *during his lifetime*, though he may devise to her by will, for that does not become operative until after his death. All suits, even for personal injuries to her, must be brought in the name of her husband and herself, and with his concurrence. Upon the marriage the husband becomes liable to all her debts but neither the wife nor her property is liable for any of his debts.

And, here, it is important to notice that the differences exemplified in the French laws and in the English laws are, for the most part, the very same as exist in the United States and Canada between those parts settled by English subjects and those settled by the French or the Spaniards. For the English settlers carried with them the common law of England, and the French and Spanish colonizers transplanted the civil law of Rome on the continent of America. Hence, at the present day, the marriage law of the northern part of the United States is based upon English law; while the marriage law of the Southern States is largely the civil law, as moulded in the jurisprudence of France and Spain. And thus the marriage law of the Province of Quebec differs widely from that of the provinces which are of English origin.

From the preceding comparison of the marriage jurisprudence of different countries, it is obvious that upon a change of domicil, or even of temporary residence, from a state or country governed by one law to another governed by another law, what various questions of an interesting and practical nature may grow up from this conflict of local and municipal jurisprudence. It is the province of international jurisprudence to lay down rules for the equitable decision of such questions, and those rules I shall now attempt to enunciate and explain.

The subject may be considered in two parts: first, the powers and disabilities placed upon the wife by marriage, and secondly, the effect of the marriage upon the rights and interests of the husband or wife; or of both of them, in the property belonging to them at the time of marriage, or subsequently acquired by them.

It is a general rule that the wife is deemed to have the same domicil as her husband; and she can, during her coverture, acquire no other in her own right. Her acts done in the place of her domicil will have validity or not, as they are or are not valid there. But as to her acts done *not in her domicil*, their validity will depend upon the policy of the state in which the act was done. The act which one state might hold valid, another might hold invalid or prohibit. And every state is invested by the law of nations, with supreme power *within its own territory.*

" Where the domicil of marriage remains unchanged, the acts of the wife and her power over her property in a foreign country are held by many foreign jurists to be exclusively governed by the law of the domicil ; " and this rule applies to her immovable as well as her movable property. Thus, if by the law of her domicil she cannot alien property or cannot contract, except with the consent of her husband, she labors under the same disabilities in a country where no such restriction exists. But, suppose that by the law of her domicil the wife cannot alien her property without the consent of her husband, and that they remove to a country where consent is not necessary, is the law of the new domicil, as to the capacity of the wife, or that of the old domicil to prevail ? Thus, for example, the law of England disables a wife from making a will in favor of her husband, or any other person ; the law of France allows it. Suppose a husband and wife, married in and subjects of England, should temporarily or permanently become domiciled in France, would a will of the wife *in France in regard to her property in England*, made in favor of her husband, or others, be held valid in England ? It is difficult to answer definitely this important and practical question. Many foreign jurists hold that the law of the *new domicil* must, in all cases of change of domicil, govern the capacities and rights of property of married women, as well as their obligations, acts and duties. Those jusists would answer the question in the affirmative. Other foreign jurists maintain that the law of the *matrimonial* domicil ought to prevail, because that law determines the status of the wife, which cannot be changed by any change of domicil. Merlin, after maintaining for forty years, as he himself says, that the law of the matrimonial domicil ought to govern, changed his opinion, and advocated the doctrine in favor of the law of the new domicil, and this doctrine seems to be the one that prevails.

The effect of marriage upon the mutual property of husband and wife is frequently a subject of legal controversy. " The principal difficulty is not so much to ascertain what rule ought to govern in cases of express nuptial contract, at least, when there is no change of domicil, as what rule ought to govern in cases where there is no such contract, or no contract which provides for the emergency." When there is an express nuptial contract that, if it speaks fully to the very point, will generally be admitted to govern all the property of the parties, not only in the matrimonial domicil, but in every other place, under the same limitations and restrictions as apply to other cases of contract. But when there is no express nuptial contract, or none

speaking to the point, the case is surrounded with more difficulty. Is the law of the matrimonial domicil to govern? Or is the law of the situation of the property? Or is the law of the actual or new domicil of the parties? Does the same rule apply to movable as to immovable property when it is situated in different countries? The classes of cases which give rise to such questions may be considered under two groups; first, where there is no change of domicil during the marriage, and, secondly, where there is such a change.

In cases where there is no change of domicil and no express nuptial contract, it is a broad rule that not only the contract of the marriage itself, properly celebrated in a place according to its laws, is valid in all other places; but that the rights and effects of the marriage contract, according to the laws of the place, are to be held equally in force everwhere. Thus, in Holland, married persons have a community of all their property, unless it is otherwise agreed in their nuptial contract; and this will have effect in respect to property situated in Friesland, although in that province there is only a community of the losses and gains, and not of the property itself. Thus a Friesian married couple remain after their marriage the separate owners of property situated in Holland; and it has been remarked that the greater number of the jurists of France and Holland are of the opinion that in settling the rights of husband and wife, on the dissolution of marriage, to the property acquired by them, the law of the place where the marrige was contracted, and not of that where it was dissolved by death, must be the guide. This opinion, doubtless, is based upon the rule, that in the interpretation of a contract, the intention of the parties to the contract should be strictly observed. But the law of the matrimonial domicil must be presumed to give the intention of the parties, and, therefore, that law should govern the disposition of property subsequently acquired by them. This reasoning, with respect to personal property, seems most convincing; but it does not apply with equal force to the disposition of real property which is, in several respects, the property of the *State*, and therefore subject to its laws. If a Frenchman acquires *lands* in England, he holds that property subject to the laws of England, not those of France. The law upon the point under discussion seems to be, that in the case of a marriage without any nuptial contract, the *lex loci contractus* (law of place of contract) will govern as to all movable (personal) property; and as to all immovable (real) property *within that country*, and as to property in other countries, it will govern movables, but not immovables, the former having no

situs (following the person of the owner), and the latter being governed by the *lex rei sitae* (law of the state in which the property is situate).

In the next place, what is the principle to be adopted when there has been a change of domicil? This question has reference to property acquired by the parties either before or after removal. Each case has reference to the operation of law only when there is no express nuptial contract between the parties. Bouhier lays down the rule in general terms, that in relation to the beneficial and pecuniary rights of the wife, which result from matrimonial contract, either express or tacit, the husband has no power by a change of domicil to alter or change them, and he insists that this is the opinion of jurists generally. Thus, if by the law of the matrimonial domicil there exists a community of property between a man and his wife, and they remove to a place where no such community exists, the rights of neither party are changed, and the converse proposition is true likewise; for, if the married couple did not agree to a community of goods in the beginning, it is not probable that they would adopt it on a change of domicil. And the opinion of the Supreme Court of Louisiana is that the greater number of foreign jurists are of opinion that in settling the rights of husband and wife, on the dissolution of marriage, to the property acquired by them, the law of the *domicil* of *marriage* is to be the guide. This statement admits of doubt. In England, Lord Eldon is reported to have held that the law of the *actual* domicil governs as to all property without any distinction, whether it is property acquired before or after the removal. And from reported cases, it seems that the law of Prussia makes the law of the *actual* domicil regulate the rights of the parties to the movable property. In America, there has been a general silence on this point, in the States governed by the common law. But in Louisiana, whose jurisprudence is framed upon the basis of the Spanish and French law (as has been shown), the point has several times come under judicial decision. The law of community exists in that State and from its proximity to States under the common law, some of the doctrines which have so frequently perplexed jurists, have been necessarily brought under review.

It is manifest that the great body of foreign jurists who maintain the universality and ubiquity of the operation of the law of the matrimonial domicil, notwithstanding any subsequent change of domicil, found their arguments upon the doctrine of a *tacit contract*, entered into by marriage, which should be a legal obligation everywhere. This tacit contract is

a *legal fiction*. On the other hand, those jurists who advocate the doctrine of *actual domicil*, regard the law of community as a real law and not a personal law, and, therefore, that it ought to regulate all the things which are situated within the limits of the country where it is in force, but not elsewhere. This view is in accordance with the principle that every state has sovereign power within its own territory; and it is the position taken by the Supreme Court of Louisiana, which held that where a married couple had removed from Virginia, their matrimonial domicil, where community does not exist, into Louisiana, where it does exist, the acquests and gains acquired after their removal were to be governed by the laws of community in Louisiana. In general, the doctrines thus maintained in Louisiana will form the basis of American jurisprudence upon this subject.

The following conclusions seem to be deduced from the preceding discussion. When there is a marriage between parties in a foreign country, and an express contract respecting their rights and property, present and future, that, as a matter of contract, will be held valid everywhere, unless, under the circumstances, it stands prohibited by the laws of the country where it is sought to be enforced; it will act directly on movable property everywhere; but, on immovable property, in foreign territory, it will only confer a right of action to be enforced by the *local* law. Where such an express contract applies in terms or intent only to present property, and there is a change of domicil, the law of the actual domicil will govern the rights of the parties as to all future acquisitions. Where there is no express contract, the law of the matrimonial domicil will govern as to all the rights of the parties to their present property in that place, and as to all personal property everywhere; but the *lex rei sitae* will govern as to real property. Where there is no change of domicil, the same rule will apply to future acquisitions as to present property; but where there is a change of domicil the *law of the actual domicil* will govern as to all future acquisitions of personal property, and the *lex rei sitae* as to all real property. Where there is no change of domicil, the same rule will apply to future acquisitions as to present property; but where there is a change of domicil, the the law of the actual domicil, and not of the matrimonial domicil, will govern as to all future acquisitions of movable property and as to all immovable property the *lex rei sitae*. And here also, as in cases of express contract, the exception is to be understood, that the laws of the place where the rights are sought to be enforced do not prohibit such arrangements.

For, if they do, as every nation has a right to prescribe rules for the government of all persons and property within its own limits, its own law, in a case of conflict, ought to prevail. Although, in a general sense, the law of the matrimonial domicil is to govern in relation to the incidents and effects of marriage, yet this doctrine must be received with many qualifications and exceptions; for, no other nation will recognize such incidents and effects when they are incompatible with its own policy, or injurious to its own interests. Thus, a marriage in France or Germany may be dissolved for incompatibility of temper; but no divorce would be granted from such a marriage celebrated in France or Germany, for such a cause, in England, Scotland or America. The doctrine of *tacit contract* is questionable in itself, and it has been shown that it has been doubted in Louisiana; and it may be added that the Scottish courts have utterly refused to allow the doctrine of such a tacit contract to regulate the right of divorce.

The exact meaning of *matrimonial domicil* must now be considered. Is it the place where the parties are domiciled, if the marriage is celebrated elsewhere? or, is it the place where the contract of marriage is entered into? or, is it the place of *actual* marriage? or, if the husband and wife have different domicils, whose is to be regarded as the *matrimonial domicil*? Such perplexing questions as these frequently arise, and foreign jurists have given them careful examination. Where the domicil of both parties, the place of contract, and also of celebration, is the same, there can be no doubt that such place is the "*matrimonial domicil.*" But, suppose that neither of the parties has a domicil in the place where the marriage is celebrated; but, that it is a marriage *in transitu*, or during a temporary residence, or on a journey made for that sole purpose; what is there to be deemed the *matrimonial domicil*? In such cases the rule is that the *actual* or *intended* domicil of the parties is to be deemed the *matrimonial domicil.* But, suppose a man domiciled in Boston should marry a lady domiciled in New Orleans, what is then to be deemed the matrimonial domicil? Foreign jurists would answer that it is the domicil of the husband, if the intention of the parties is to fix their residence there; and of the wife, if the intention is to reside in her home; and if the intention is to reside in some other place, as in New York or Washington Territory, then the matrimonial domicil would be in such place; and the marriage is presumed to be contracted according to the laws of the place where the parties intend to fix their home. It has also been laid down as a principle that the matrimonial rights

of a wife who marries with the intention of an instant removal for residence into another state, are to be regulated by the laws of the intended domicil, when no marriage contract is made, or, one without any provision in this respect. But, where the husband and wife have different domicils, the general rule is that the domicil of the husband shall prevail; because the wife is presumed to follow her husband's domicil. This rule will apply when no domicil is fixed upon immediately after the marriage. Under these circumstances, the rule seems firmly established that in the marriage contract, as in other contracts, *the law of the place where they are to be performed governs the contract.* And it is submitted that this conclusion is in accordance with analogy and reason. For, if treated as a matter of *tacit contract*, the marriage, reasoning from analogy, should be subject to the same rules as any ordinary contract; and if treated as a matter to be governed by municipal law, to which the parties were, or meant to be, subjected by their future domicil, the doctrine seems equally capable of successful vindication. (Based upon "Story.")

CHAPTER V.

LEGAL PRINCIPLES GOVERNING DIVORCES.

In discussing the principles governing the granting of divorces I shall not enter into any argument to prove the moral right of a state to invest any court or civil body with the power to dissolve marriage contracts. It may be sufficient to state that all modern nations deem it within the competency of legislation to provide for such a dissolution of marriage relationship, and to release in some form, and for specific reasons; and, as a first general principle, it may be stated that a divorce regularly obtained, according to the law of the country where the marriage is celebrated, and where the parties are domiciled, will be held a complete dissolution of the matrimonial contract in every other country. But this rule holds only when the divorce is

granted in the place where the parties are domiciled and where the marriage was celebrated; and the presence of one of those important points and the absence of the other may change the legal relations of the parties, according to the jurisprudence of different countries, when the case comes under judicial consideration. "The real difficulty is to lay down applicable principles to govern cases when the marriage is celebrated in one state, and the parties are at the time domiciled in another; where afterwards there is a change of domicil by one party without a similar change by the other party; where, by the law of the place of celebration, the marriage is indissoluble, or dissoluble only under particular circumstances, and where, by the law of another place, it is dissoluble for various other causes, and even at the pleasure of the parties." By the law of Canada, marriage is indissoluble except by a special Act of Parliament. By the law of Massachusetts and New York, divorces are grantable by judicial tribunals for the cause of adultery. By the civil law an almost unbounded license was allowed to divorces, and wives were often dismissed by their husbands, not only for want of chastity and intolerable temper, but for causes of the most frivolous nature. In France, a divorce may be obtained judicially for the cause of adultery, excess, cruelty, or grievous injuries of either party; and, in certain cases, by mutual and persevering consent. In England, a divorce may be obtained by the husband on the charge of adultery against his wife; and by the wife on a charge of adultery coupled with cruelty or desertion against her husband, the case being heard before the court for divorce and matrimonial causes which has superseded special legislation for divorce purposes. In some of the States of America divorces are grantable judicially for causes of inferior grossness and enormity, approaching even to frivolousness. In other States, divorces can be pronounced by the legislature only, and for such causes as, in its wisdom, it may choose from time to time to allow.

Such differences in the divorce laws of various countries must inevitably give rise to many perplexing questions. Suppose, for instance, a marriage celebrated in Ontario, where marriage is indissoluble, and a divorce obtained in New York, as it may be for adultery, under its laws, will that divorce be operative in Ontario, so as to authorize a new marriage there by either party? It is submitted that the divorce would not be operative in Ontario (under Lolley's case), and, therefore neither party could contract a *new* marriage *in Ontario*, although they could do so in *New York*.

Upon the continent of Europe there has long existed a difference between the Catholics and the Protestants upon the subject of divorce. Catholics regard marriage as a sacrament, and consequently believe that its effects should be governed by the divine law; and, according to their interpretation of that law, they hold marriage to be indissoluble; for, "Quod Deus conjunxit, homo non separet"—"What God hath joined together let not man put asunder." Protestants are less rigid in their interpretation of the Divine Word. In England and Scotland divorces are only granted for the Scriptural reason of adultery; but in the Protestant continental states of Europe divorces may be granted for many other causes; and in America, as we have seen, it is generally treated as a matter of civil regulation.

From the different nature of the respective laws of England and Scotland upon the subject of divorce, from their national union, and from their constant, easy and familiar intercourse, the courts of both countries have been frequently called upon to pronounce very elaborate judgments respecting the jurisdiction and law of divorce in suits and contestations before them. Several questions on this subject have been recently discussed in the courts of Scotland, and as they involve leading principles on divorce, it is necessary to present them in this connection. One is whether a *permanent* domicil of the parties is indispensable to found a jurisdiction in cases of divorce. This question has been answered by the courts in the negative; the doctrine being established by the decisions given in a number of cases, that a *temporary* residence of the parties to the suit is sufficient to found the jurisdiction. This doctrine has been maintained with great learning and ability in Lolley's case, where English subjects were married in England, and afterwards the husband went to Scotland and procured a divorce, and then returned to England and married another wife, it was decided that the second marriage was void, and the husband was guilty of bigamy. The decision arrived at in this celebrated case turned upon the point that at the time the divorce was granted both husband and wife were *in fact* domiciled in England, and the residence in Scotland was merely *fugitive*, and not *temporary*. And in another case, where there was no change of domicil, and the parties were not at the time *bona fide* domiciled in Scotland, a Scottish divorce from an English marriage was declared utterly void.

The principles under discussion naturally give rise to the following questions: Whether an English marriage between English subjects can, under any possible circumstances, be dissolved by a decree of divorce in Scotland? Whether a marriage

in Scotland by English subjects, domiciled at the time in England, is dissoluble under any circumstances, by a decree of divorce in Scotland? Whether, in case of a marriage in England, it will make any difference that the parties are both Scotch persons, domiciled in Scotland, or afterwards become *bona fide* and permanently domiciled there? Upon these questions the highest tribunals in Scotland have come to the following conclusions: First, that a marriage between English subjects in England, and indissoluble there, may be lawfully dissolved by the proper Scottish court for a cause of divorce good by the law of Scotland, when the parties are within the process and jurisdiction of the court. Secondly, that a Scottish marriage by persons domiciled at the time in England, is dissoluble in like manner by the proper Scottish court. Thirdly, that, in case of a marriage in England, it will make no difference that the parties are Scottish persons domiciled in Scotland, or afterwards *bona fide* and permanently domiciled there. The result of these opinions is that the mere fact of the marriage having been celebrated in England, whether it is between English or Scottish parties, or both, is not *per se* a defence against a suit of divorce for adultery committed in Scotland.

That those conclusions are based upon sound reasoning and common-sense, admits of no doubt. Every person is bound to obey the laws of the state in which he sojourns or resides. He seeks redress of wrong from that state; and hence, his case must be decided by the law of that state. The obligations of husband and wife are mutual and enduring. At the time of marriage it must have been the intention of each to fulfil their marital vows in whatever country Providence might lead them to reside. They, therefore, had in view the redress of all wrongs and the enforcement of all rights by the law of the state which at any time should give them shelter and protection. And, moreover, the conclusions under consideration are strictly in accordance with the fundamental principle of international law, that every state is supreme within its own realm.

In opposition to the doctrine of the Scottish courts it was held for some time that the decision given in Lolley's case proceeded upon the general ground that an English marriage is incapable of being dissolved under any circumstances by a foreign divorce. And, Lord Eldon is reported to have said, "Here, then, we have a case (Lolley's) in which both parties were domiciled in England, and then the husband went to Scotland, where it was said he had a domicil by reason of origin and his being heir of an estate-tail there, and instituted a suit against his wife, which she said did not affect her in England;

and if his domicil was at Durham, the answer would be sufficient, though the rule of law should be admitted that the domicil of the wife followed that of her husband. But if the jurisdiction, by reason of the original domicil (Scotland), could be maintained, it would be attended with the most important consequences to the law of marriage." And Lord Brougham, in delivering a judgment some time afterwards, said, "I hold it to be perfectly clear that Lolley's case stands as the settled law of Westminster Hall at this day." For a long time, English judicial opinions were against the doctrine that an English marriage is dissoluble by a Scottish divorce, or any other. The reasoning by which this position was fortified was to the following effect: The *lex loci contractus* furnishes a just rule for the interpretation of the rights and obligations incidental to the marriage contract. If any other rule were adopted, marital rights and obligations would become loose and unsettled, and increase of immorality would be inevitable. It is not just that one party should be able, at his option, to dissolve a contract by a law different from that under which it was formed, and by which the other party understood it to be governed. There is no solid ground upon which any government can yield up its fundamental laws and policy as to its own subjects, in favor of the laws or acts of other countries.

This whole subject, however, recently came before the House of Lords in England, upon an appeal from the Court of Session in Scotland, in which the direct question was, whether it was competent for the Scottish courts to decree a divorce between parties domicled in Scotland who were married in England? The preliminary question presented was, whether, even assuming the parties to be domiciled in Scotland, the suit could be maintained in Scotland for a divorce from an English marriage which was by the law of England indissoluble. The Court of Session affirmed the jurisdiction to decree the divorce; and this decree was, upon appeal, confirmed by the House of Lords. Lord Brougham, in delivering his judgment in this case, went into an elaborate examination of the general principles of international law, and in doing so maintained the opinion that upon principles of public law, a divorce from an English marriage, made by a competent court of a *foreign country* where the parties are domiciled, *ought* to be deemed in England to dissolve the marriage, and to confer upon the parties all the rights arising from a lawful dissolution. It must, however, be borne in mind that the House of Lords, sitting as a court of appeal in a case coming from Scotland, was bound to administer the law of Scotland; and it, therefore, did not decide what

effect that divorce would have or ought to have in England, if it should be brought in question in an English court of justice. In all probability the divorce in question would be considered invalid in an English court of justice.

Turning to the record of American courts, illustrations of divorce principles present themselves. Thus, where a marriage celebrated in Massachusetts had been dissolved in Vermont, upon a suit by the husband for a divorce, for the cause of extreme cruelty of his wife (a cause inadmissible by the laws of Massachusetts to dissolve a marriage), it appearing that the parties at the time had not any permanent domicil in Vermont, but that the husband had gone there for the purpose of obtaintaining a divorce, the divorce was held a mere nullity, upon the ground that there was no real change of domicil. In another case, the general question came before the court whether a marriage celebrated in Massachusetts could be dissolved by a decree of divorce of the proper State court of Vermont, both parties being at the time *bona fide* domiciled in that State, and the cause of divorce being such as *would not authorize* a divorce *a vinculo* in Massachusetts. The court decided in the affirmative, upon the ground that the actual domicil must regulate the right; and the reasons assigned for the decision were substantially the following: Regulations on the subject of marriage and divorce are rather parts of criminal than civil law. A divorce is punishment for immorality or violation of natural law; the *lex loci*, therefore, should govern as it does in all other criminal offences. In another case, the question as to the jurisdiction to found a suit for a divorce also arose, and it was held that ordinarily, such a suit cannot be entertained unless the parties are *bona fide* domiciled in the State in which the suit is brought; and for this purpose the domicil of the husband must be treated as the domicil of the wife. Hence, if a husband should *bona fide* remove from Massachusetts to another State, with his wife, and then a good cause for a divorce by law should occur, a suit could not be maintained therefor in the courts of Massachusetts. But the court thought that cases might arise in which the change of domicil of the husband might not deprive the wife of her right to sue for a divorce in the State where they originally lived together. In New York, as far as decisions have gone, they coincide with those of Massachusetts. Thus, in a case where the marriage was in New York, and afterwards the wife went to Vermont and instituted a suit for divorce there for a cause not recognized by the laws New York, against her husband, who remained domiciled in New York, the Supreme Court of New York refused to carry

the decree into effect in regard to alimony, notwithstanding the husband had appeared in the cause, upon the ground that there being no *bona fide* change of the domicil of the parties, it was an attempt fradulently to evade the force and operation of the laws of New York. In another case, where the marriage was in Connecticut, and the husband afterwards went to Vermont and instituted a suit there for a divorce against his wife, who never resided there and never appeared in the suit, it was held that the decree of divorce obtained in Vermont was invalid, being a legal fraud against the State where the parties were married and domiciled.

The doctrine firmly established upon the preceding cases clearly is, that the law of the place of the *actual bona fide* domicil of the parties gives jurisdiction to the proper courts to decree a divorce for any cause allowed by the *local law*, without any reference to the law of the place of the original domicil, or the place where the offence for which the divorce is allowed was committed.

And the natural conclusion to be deduced from the practice of the courts in dealing with cases of divorce is, that the *incidents* to a foreign divorce are to be deduced from the law of the place where it is decreed. If valid there, the divorce will have, and ought in general to have, all the effects in every other country upon personal property situated there, which are properly attributable by it in the court where it is decreed. In respect to real or immovable property, the same effect would, in general, be attributable to such divorce as would ordinarily belong to a divorce of the same kind by the *lex loci rei sitae*. If a dissolution of the marriage would then be consequent upon such divorce, and would then extinguish the right of dower, or of tenancy by the courtesy, according to the local law, then the like effects would be attributed to the foreign divorces which evoked a like dissolution of the marriage. (Based upon "Story.")

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